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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUL 12 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Petition for Relief from Unjust and)
Unreasonable Discrimination in the)
Deployment of Video Dialtone Facilities)

In the Matter of)
)
Petition for Rulemaking to Adapt the)
Section 214 Process to the Construction)
of Video Dialtone Facilities)

RM-8491

OPPOSITION OF BELLSOUTH

BellSouth Corporation and BellSouth Telecommunications, Inc., ("BellSouth") hereby oppose the Petition for Relief and the Petition for Rulemaking filed on May 23, 1994, by the Center for Media Education, Consumer Federation of America, the Office of Communication of the United Church of Christ, the National Association for the Advancement of Colored People, and the National Council of La Raza ("Petitioners").

The Petition for Relief alleges that the video dialtone applications of four Regional Bell Operating Companies contain "indications" of "electronic redlining" designed to avoid low income and minority communities.¹ Petitioners contend that these applications are inconsistent with the universal service goal established in Section 1 of the Communications Act and with the prohibition against unreasonable discrimination contained in Section 202(a) of

¹ Petition For Relief at i.

the Act. Petitioners ask the Commission to take the following three actions -- without the benefit of notice and comment rulemaking procedures:

(1) issue a policy statement announcing its commitment to the goal of universal video dialtone service, and to nondiscriminatory deployment at each phase of construction;

(2) issue an interpretive rule clarifying that applicants seeking to construct and operate video dialtone facilities are already required to adhere to the objectives of universal service and the avoidance of discrimination on the basis of income level, race, or ethnicity; and

(3) adopt a procedural rule instructing its staff to identify and bring to its attention applications which appear to violate these objectives, and remand these applications so that the telephone common carriers have the opportunity to conform them to the existing objectives.²

The Petition for Rulemaking asks that the Commission adopt rules to outlaw "redlining" by Section 214 video dialtone applicants:

Specifically, at each phase of video dialtone deployment, providers should be required to make that service available to a proportionate number of lower income and minority customers. Further, those proposing new communications service facilities should be required to provide the Commission with the means of evaluating their compliance with the anti-redlining clause.³

BellSouth is fully committed to the provision of its services without discrimination based upon racial or income

² Petition for Relief at ii-iii, 14.

³ Petition for Rulemaking at 3.

classifications.⁴ In addition to the moral and legal imperatives underlying this policy, it makes good business sense. Video dialtone is an optional service that generally will be offered in markets dominated by an incumbent cable television operator. Telephone companies must offer video dialtone service to willing customers -- regardless of race, ethnic origin, or income status -- if they are to compete successfully against incumbent cable operators.

BellSouth's commitment to deploy its services without discrimination based upon racial or income classifications should not, however, be equated with a commitment to invest private capital to provide video dialtone services where there is insufficient demand to support that investment. Video dialtone will be offered as a competitive alternative to the video programming distribution provided by existing cable operators. Competitive pressures will not permit the provision of video dialtone in areas that will not produce revenues to cover the cost of providing the service. If the potentially viable markets for video dialtone service are forced to bear the cost of deployment in non-viable markets,

⁴ BellSouth recently filed an application to conduct a trial of video dialtone service in an area of broad economic and cultural diversity. In the Matter of the Application of BellSouth Telecommunications, Inc., For Authority Under Section 214 of the Communications Act of 1934 to Construct and Operate Integrated Network Facilities for a Trial of Channel Service and Video Dialtone Service in the City of Chamblee, Georgia, and Adjacent Communities in DeKalb County, Georgia, File No. W-P-C-____, filed June 27, 1994.

video dialtone will fail, and the entrenched cable monopolies will remain.

Thus, while BellSouth is committed to deployment of its services without discrimination based upon racial or income classifications, it opposes the measures advocated by Petitioners. Petitioners fundamentally misconstrue the nature of the common carrier and non-discrimination obligations imposed by the Communications Act. Petitioners treat a common carrier obligation as equivalent to a universal service obligation. It is not.

The quote from Vice President Gore cited in the Petition for Relief recognized that if access to broadband networks is to be made a part of universal service, funding must be provided "on an equitable and competitively neutral basis."⁵ In contrast, Petitioners would impose the entire burden of an expanded universal service definition on the telephone companies and their customers. This position is completely at odds with the position recently espoused by one of the present petitioners, the Consumer Federation of America, in a Joint Petition with the National Cable Television Association.⁶ There the Consumer Federation of

⁵ Petition for Relief at 9.

⁶ Compare "Joint Petition for Rulemaking and Request for Establishment of a Joint Board", Consumer Federation of America and National Cable Television Association, Inc., April 8, 1993, at 9: "Forcing telephone customers to bear all of these costs is unjustified economically and unsound policy." (Emphasis in the original.) ("Joint Petition")

America opposed any requirement that telephone ratepayers bear the cost of constructing and operating video dialtone facilities.⁷ Also, in joint comments in the video dialtone rulemaking, the Consumer Federation of America and the Office of Communication of United Church of Christ stated: "CFA and OC/UCC emphatically do not endorse the Commission's goal of facilitating the deployment of a new telecommunications infrastructure, given the unrealized potential of the existing infrastructure."⁸ For these parties now to assert that the existing universal service obligation of telephone companies includes video dialtone service is an unexplained, 180 degree reversal of position.

In addition to misconstruing the universal service obligation of the telephone companies, Petitioners misstate the scope of the non-discrimination obligation of common carriers. A common carrier is not obliged to serve ubiquitously. From the earliest times, common carriers have been permitted to offer service in a limited geographical area. For example, ferry operators in England were considered common carriers -- they were obliged to transport all comers from one side of the river to the other without discrimination at the location selected by the ferry

⁷ Joint Petition at 3.

⁸ In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Comments of Consumer Federation of America and Office of Communication of United Church of Christ (February 3, 1992) at 6-7.

operator. Customers had no right, however, to demand that additional river crossings be established by the ferry operator.⁹ Similarly, the Commission has recognized since 1971 that "specialized common carriers" can lawfully serve limited geographical areas.¹⁰ Also, electric utilities have a non-discrimination obligation like that of common carriers. Not until Congress passed the Rural Electrification Act, however, was electric power extended to many rural areas, and then only with government financial assistance. Thus, the existence of a common carrier non-discrimination obligation does not carry with it an obligation to serve all geographical locations.

Because Petitioners begin with a false premise, the specific relief requested must be denied. As shown above, the common carrier status of video dialtone providers does not automatically carry with it a universal service obligation. If a video dialtone universal service obligation is to be imposed, the Commission must conduct a rulemaking proceeding to define the scope of the obligation and its funding. Moreover, the general nondiscrimination

⁹ See, e.g., Michael K. Kellogg, et al., Federal Telecommunications Law, Sec. 1.3.1, Common Carriage (Little, Brown & Co., 1992).

¹⁰ Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service, 29 F.C.C.2d 870 (1971), recon., 31 F.C.C.2d 1106 (1971), aff'd. sub nom., Washington Util. & Trans. Comm. v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. den., 423 U.S. 836 (1975).

provisions of Title II do not authorize establishment of quotas for minority and low income customers in the deployment of common carrier services.

BellSouth will not address the specifics of the studies attached to the Petition for Relief, since the carriers whose video dialtone applications were attacked will presumably do so themselves. BellSouth notes, however, that Petitioners do not, nor can they, demonstrate that their "disparate impact" analysis is an appropriate standard to show undue discrimination under Title II of the Communications Act, or that the conclusions drawn from the raw data presented in the analysis are statistically valid.¹¹ Moreover, the Commission should not engage in rulemaking that would affect the entire telephone industry based on Petitioners' attack on a few video dialtone applications. If Petitioners truly believe that the video dialtone applications attacked in this proceeding constitute violations of the Communications Act or current Commission

¹¹ Even if statistically valid, the studies submitted by Petitioners are irrelevant in this proceeding. In the context of enforcement of the FCC's EEO rules, which contain specific non-discrimination requirements, statistical analyses of the type offered by Petitioners are insufficient, by themselves, to establish the existence of racial discrimination. See Florida State Conference of Branches of the NAACP, et al. v. FCC, No. 93-1162 (D.C. Cir. May 27, 1994); Tallahassee Branch of the NAACP v. FCC, 870 F.2d 704, 710 (D.C. Cir. 1989). If such studies are deemed irrelevant in testing compliance with the Commission's specific EEO requirements, they are certainly irrelevant in determining compliance with the general non-discrimination requirements imposed on common carriers.

rules, they can file formal complaints against the specific telephone companies involved pursuant to Section 208 of the Communications Act.

The implication by Petitioners that telephone common carriers are engaging in conscious discrimination against minorities or people of low income in their video dialtone applications¹² is simply not credible. Video dialtone will be economically viable only if it achieves a critical mass of customers. Video dialtone providers have every incentive, both in trials and in commercial deployment, to appeal to the broadest cross-section of potential

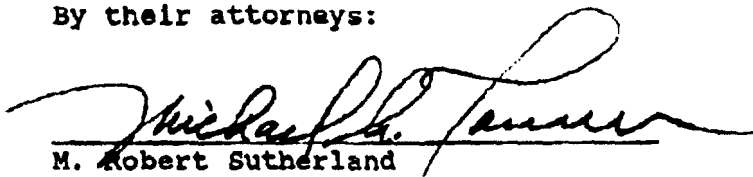
¹² See Petition for Relief at 11: "Section 202(a) is violated by the 'redlining' being practiced by the telephone common carriers on the basis of minority and/or income status. Petitioners believe that such discrimination on the basis of either minority or income status is facially unreasonable."

subscribers. For Petitioners to accuse the telephone industry of deliberate discrimination based on such flimsy evidence is unwarranted and irresponsible. The Commission should reject both petitions.

Respectfully submitted,

BELLSOUTH CORPORATION AND
BELLSOUTH TELECOMMUNICATIONS, INC.

By their attorneys:



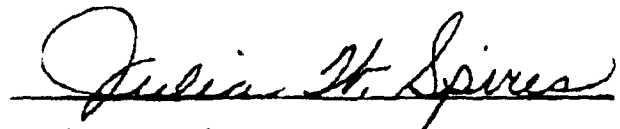
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July 12, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have this 12TH day of July, 1994, serviced all parties to this action with a copy of the foregoing OPPOSITION reference to Petition for Relief from Unjust and Unreasonable Discrimination in the Deployment of Video Dialtone Facilities, by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties as set forth on the attached service list.


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